

7  
No. 91-72

Supreme Court, U.S.

FILED

NOV 21 1991

OFFICE OF THE CLERK

In The  
Supreme Court of the United States

October Term, 1990

FEDERAL TRADE COMMISSION,

*Petitioner,*

v.

TICOR TITLE INSURANCE CO., et al.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICUS CURIAE STATES OF WISCONSIN,  
ALABAMA, ALASKA, ARIZONA, ARKANSAS, DELAWARE  
IDAHO, IOWA, FLORIDA, KENTUCKY, LOUISIANA, MAINE,  
MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA,  
MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE,  
NEW JERSEY, NEW YORK, NORTH CAROLINA,  
NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE  
ISLAND, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA,  
WASHINGTON, WEST VIRGINIA AND WYOMING, IN SUPPORT  
OF PETITIONER

**J. JOSEPH CURRAN, JR.**

Attorney General

**ROBERT N. MCDONALD**

**ELLEN S. COOPER**

Assistant Attorneys General

200 St. Paul Place

19th Floor

Baltimore, Maryland 21202

(301) 576-6470

**JAMES E. DOYLE**

Attorney General

**KEVIN J. O'CONNOR\***

Assistant Attorney General

State of Wisconsin

Wisconsin Department of Justice

Post Office Box 7857

Madison, Wisconsin 53707-7857

(608) 266-8986

*\*Counsel of Record*

*(Additional Attorneys General listed inside)*

## LIST OF COUNSEL

---

### *Counsel for the State of Alabama*

**JAMES H. EVANS**

Attorney General

**Marc Givhan**

Chief, Antitrust Division

Office of Attorney General

11 South Union Street

Montgomery, Alabama 36130

(205) 242-7331

### *Counsel for the State of Alaska*

**CHARLES E. COLE**

Attorney General

**James Forbes**

Assistant Attorney General

1031 West 4th Avenue, Suite 200

Anchorage, Alaska 99501

(907) 269-5200

### *Counsel for the State of Arizona*

**GRANT WOODS**

Attorney General

**H. Leslie Hall**

Chief Counsel, Consumer Protection

and Antitrust Section

**Jeri K. Auther**

Assistant Attorney General

1275 West Washington

Phoenix, Arizona 85007

(602) 542-3702

*Counsel for the State of Arkansas*

**WINSTON BRYANT**

Attorney General

**Royce Griffin**

Deputy Attorney General

200 Tower Building

4th and Center Streets

Little Rock, Arkansas 72201

(501) 682-2007

*Counsel for the State of Delaware*

**CHARLES M. OBERLY III**

Attorney General

Department of Justice

820 North French Street

Wilmington, Delaware 19801

(302) 577-2500

*Counsel for the State of Florida*

**ROBERT A BUTTERWORTH**

Attorney General

**Jerome W. Hoffman**

Chief, Antitrust Division

Office of the Attorney General

The State of Florida

The Capitol

Tallahassee, Florida 32399-1050

(904) 488-9105

*Counsel for the State of Idaho*

**LARRY ECHOHAWK**

Attorney General

**Brett T. DeLange**

Deputy Attorney General

Office of the Attorney General

State House, Room 113A

Boise, Idaho 83720

(208) 334-2424

*Counsel for the State of Iowa*

**BONNIE J. CAMPBELL**

Attorney General

**John R. Perkins**

Deputy Attorney General

Hoover Building, 2nd Floor

Des Moines, Iowa 50319

(515) 281-5164

*Counsel for the State of Kentucky*

**FREDERIC J. COWAN**

Attorney General

**James M. Ringo**

Assistant Attorney General

State Capitol Building

Frankfort, Kentucky 40601

(502) 564-7600

*Counsel for the State of Louisiana*

**WILLIAM J. GUSTE, JR.**

Attorney General

**Jesse James Marks**

Assistant Attorney General

Chief, New Orleans Office

**Anne F. Benoit**

Assistant Attorney General

Chief, Antitrust Division

Louisiana Department of Justice

234 Loyola Avenue, 7th Floor

New Orleans, Louisiana 70112

(504) 568-5575

*Counsel for the State of Maine*

**MICHAEL E. CARPENTER**

Attorney General

**Stephen L. Wessler**

Deputy Attorney General

Chief, Consumer & Antitrust Division

State House Station 6

Augusta, Maine 04333

(207) 289-3661

*Counsel for the State of Maryland*

**J. JOSEPH CURRAN, JR.**

Attorney General

**Robert N. McDonald**

Assistant Attorney General

Chief, Antitrust Division

**Ellen S. Cooper**

Assistant Attorney General

Deputy Chief, Antitrust Division

200 St. Paul Place, 19th Floor

Baltimore, Maryland 21202

(301) 576-6470

*Counsel for the State of Massachusetts*

**SCOTT HARSHBARGER**

Attorney General

**George K. Weber**

Assistant Attorney General

Chief, Antitrust Division

**Thomas M. Alpert**

Assistant Attorney General

Antitrust Division

Public Protection Bureau

One Ashburton Place, 19th Floor

Boston, Massachusetts 02108

(617) 727-2200

*Counsel for the State of Michigan*

**FRANK J. KELLEY**

Attorney General

Post Office Box 30212

Lansing, Michigan 48909

(517) 373-7110

*Counsel for the State of Minnesota*

**HUBERT H. HUMPHREY III**

Attorney General

102 State Capitol

St. Paul, Minnesota 55155

(612) 296-7575

*Counsel for the State of Mississippi*

**MIKE MOORE**

Attorney General

Post Office Box 220

Jackson, Mississippi 39205

(601) 359-3747

*Counsel for the State of Montana*

**MARC RACICOT**

Attorney General

Justice Building

215 North Sanders

Helena, Montana 59620

(406) 444-2026

*Counsel for the State of Nevada*

**FRANKIE SUE DEL PAPA**

Heroes Memorial Building

Capitol Complex

Carson City, Nevada 89710

(702) 687-4170

*Counsel for the State of New Hampshire*

**JOHN P. ARNOLD**

Attorney General

**Charles T. Putnam**

Senior Assistant Attorney General

**Walter L. Maroney**

Assistant Attorney General

25 Capitol Street

Concord, New Hampshire 03301

(603) 271-3641

*Counsel for the State of New Jersey*

**ROBERT J. DEL TUFO**

Attorney General

**Laurel A. Price**

Deputy Attorney General

25 Market Street, C.N. 085

Trenton, New Jersey 08625

(609) 633-7804

*Counsel for the State of New York*

**ROBERT ABRAMS**

Attorney General

**Jerry Boone**

Solicitor General

**George W. Sampson**

Assistant Attorney General

Bureau Chief, Antitrust Bureau

**Richard Schwartz**

Assistant Attorney General

120 Broadway, Suite 2601

New York, New York 10271

(212) 341-2275

*Counsel for the State of North Carolina*

**LACY H. THORNBURG**

Attorney General

**James C. Gulick**

Special Deputy Attorney General

**K.D. Sturgis**

Assistant Attorney General

Department of Justice

Post Office Box 629

Raleigh, North Carolina 27602

(919) 733-7741

*Counsel for the State of North Dakota*

**NICHOLAS J. SPAETH**

Attorney General

**David W. Huey**

Assistant Attorney General

State Capitol

600 East Boulevard

Bismarck, North Dakota 58505

(701) 224-3404

*Counsel for the State of Ohio*

**LEE FISHER**

Attorney General

**Doreen C. Johnson**

Chief, Antitrust Section

**Marc B. Bandman**

Assistant Attorney General

Antitrust Section

65 East State Street, Suite 708

Columbus, Ohio 43266-0590

(614) 466-4328

*Counsel for the State of Oklahoma*

**SUSAN B. LOVING**

Attorney General

**Jane F. Wheeler**

Assistant Attorney General

420 West Main Street

Oklahoma City, Oklahoma 73102

(405) 521-4274

*Counsel for the State of Pennsylvania*

**ERNEST D. PREATE, JR.**

Attorney General

**Thomas L. Welch**

Chief Deputy Attorney General

**Carl S. Hisiro**

Assistant Chief Deputy Attorney General

Antitrust Section

Office of the Attorney General

14th Floor, Strawberry Square

Harrisburg, Pennsylvania 17120

(717) 787-4530

*Counsel for the State of Rhode Island*

**JAMES E. O'NEIL**

Attorney General

**Edmund F. Murray, Jr.**

Special Assistant Attorney General

Director, Antitrust Unit

Office of the Attorney General

72 Pine Street

Providence, Rhode Island 02903

(401) 274-4400

*Counsel for the State of Tennessee*

**CHARLES W. BURSON**

Attorney General and Reporter

**John Knox Walkup**

Solicitor General

**Perry A. Craft**

Deputy Attorney General

450 James Robertson Parkway

Nashville, Tennessee 37243-0485

(615) 741-2408

*Counsel for the State of Texas*

**DAN MORALES**

Attorney General

**Will Pryor**

First Assistant Attorney General

**Mary F. Keller**

Deputy Attorney General

**Mark Tobey**

Assistant Attorney General

Acting Chief, Antitrust Division

Capitol Station

Post Office Box 12548

Austin, Texas 78711-2548

(512) 463-2100

*Counsel for the State of Utah*

**R. PAUL VAN DAM**

Attorney General

236 State Capitol

Salt Lake City, Utah 84114

(801) 538-1331

*Counsel for the State of Vermont*

**JEFFREY L. AMESTOY**

Attorney General

**Geoffrey A. Yudien**

Assistant Attorney General

109 State Street

Montpelier, Vermont 05602

(802) 828-3171

*Counsel for the State of Virginia*

**MARY SUE TERRY**

Attorney General

101 North 8th Street

Richmond, Virginia 23219

(804) 786-2071

*Counsel for the State of Washington*

**KENNETH O. EIKENBERRY**

Attorney General

**Carol A. Smith**

Assistant Attorney General

Chief, Antitrust Section

900 4th Avenue, Suite 2000

Seattle, Washington 98164

(206) 464-7663

*Counsel for the State of West Virginia*

**MARIO J. PALUMBO**

Attorney General

**Donald L. Darling**

Deputy Attorney General

Antitrust and Consumer Protection Division

812 Quarrier Street, 6th Floor

Charleston, West Virginia 25301

((304) 348-0246

*Counsel for the State of Wisconsin*

**JAMES E. DOYLE**

Attorney General

**Kevin J. O'Connor**

Assistant Attorney General

Post Office Box 7857

Madison, Wisconsin 53707-7857

(608) 266-8986

*Counsel for the State of Wyoming*

**Joseph B. Meyer**

Attorney General

123 Capitol Building

Cheyenne, Wyoming 82002

(307) 777-6869

**TABLE OF CONTENTS**

	Page
INTEREST OF THE AMICI STATES .....	2
STATEMENT OF THE CASE .....	4
SUMMARY OF ARGUMENT .....	8
ARGUMENT .....	10
I. THE CIRCUIT COURT'S STANDARD UPSETS THE CAREFULLY-DRAWN BALANCE BETWEEN THE STATES' RIGHT TO CHOOSE REGULATORY SCHEMES AND THE NATIONAL P O L I C Y F A V O R I N G COMPETITION. ....	10
A. The test applied by the lower court conflicts with long- standing precedent of this Court. ....	11
B. The lower court's standard undermines the system of cooperative federalism embodied in the state action doctrine. ....	12
C. The lower court's standard limits state regulatory choices. ....	15

II.	THE CIRCUIT COURT'S DECISION MISAPPREHENDS THE INSURANCE REGULATORY SCHEMES OF MONTANA AND WISCONSIN. ....	17
A.	Montana and Wisconsin do not review title search and examination fees. ....	18
B.	The price fixing would have made rate review impossible. ....	20
III.	THE EXTRAORDINARY WRIT OF MANDAMUS CANNOT SUBSTITUTE FOR EFFECTIVE STATE SUPERVISION. ....	22
A.	Placing the burden of enforcing state policy on consumers circumvents the policy underlying the state action doctrine. ....	23
B.	Mandamus is inappropriate to compel the insurance commissioner to perform a discretionary act. ....	25
	CONCLUSION .....	27

## CASES CITED

324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987) .....	12, 13, 24
Bolt v. Halifax Hosp. Medical Center, 891 F.2d 810 (11th Cir. 1990) .....	21
Cal. Retail Liquor Dealers Ass'n v. Midcal Alum., 445 U.S. 97 (1980) .....	6, 8, 10, 11, 13, 24
Carl N. Swenson Co. v. E.C. Braun Co., 272 Cal. App.2d 366, 77 Cal. Rep. 378 (1969) .....	3
City of Columbia v. Omni Outdoor Advertising, ___ U.S. ___, 113 L.Ed.2d 391 (1991) .....	12
Estate of Sharp, 63 Wis. 2d 254, 217 N.W.2d 258 (1974) .....	23
Gerber v. Comm'r of Ins. of State, 242 Mont. 369, 786 P.2d 1199 (1990) ...	7, 25, 26
Gerol v. Arena, 127 Wis. 2d 1, 377 N.W.2d 618 (Ct. App. 1985) .....	24
Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945) .....	3
Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251 (1972) .....	3
In re Insurance Antitrust Litig., 938 F.2d 919 (9th Cir. 1991) .....	21

Law Enforcement Standards Bd. v. Village of Lyndon Station, 101 Wis. 2d 472, 305 N.W.2d 89 (1981) . . .	24, 25
Medic Air Corp. v. Air Ambulance Auth., 843 F.2d 1187 (9th Cir. 1988) . . . . .	22
New England Motor Rate Bureau, Inc. v. F.T.C., 908 F.2d 1064 (1st Cir. 1990) . . . . .	12
Parker v. Brown, 317 U.S. 341 (1943) . . . . .	10, 13
Patrick v. Burget, 486 U.S. 94 (1988) . . . . .	8, 11, 23
St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978) . . . . .	9, 21
State ex rel. Butte Youth Serv. Center v. Murray, 170 Mont. 171, 551 P.2d 1017 (1976) . . . .	24, 25
State v. Milwaukee Braves, Inc., 31 Wis. 2d 699, 144 N.W.2d 1 (1966) . . . . .	3
State v. N.J. Trade Waste Ass'n, 96 N.J. 8, 472 A.2d 1050 (1984) . . . . .	3
Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) . . . . .	23
Vretenar v. Hebron, 144 Wis. 2d 655, 424 N.W.2d 714 (1988) . . . .	26
Will v. United States, 389 U.S. 90 (1967) . . . . .	25

## STATUTES AND RULES CITED

15 U.S.C. § 15 (1989) . . . . .	24
15 U.S.C. § 15(c) (1989) . . . . .	3
15 U.S.C. § 1012(b) (1989) . . . . .	7
Mont. Code Ann.	
§ 33-16-211 (1991) . . . . .	24
Title 37, et seq. (1989) . . . . .	15
Title 69 (1991) . . . . .	15
Title 75 (1989) . . . . .	15
§ 30-14-104 (1989) . . . . .	3
§ 30-14-133 (1989) . . . . .	24
§ 33-1-311(1) (1989) . . . . .	25
§ 33-1-317 (1989) . . . . .	25
§ 33-1-318 (1989) . . . . .	25
§ 33-1-701(1) (1989) . . . . .	25
§ 33-16-101 (1989) . . . . .	7
§ 33-16-101(2) (1989) . . . . .	18
§ 33-16-201 (1989) . . . . .	20

§ 33-16-201(1)(b) (1991) .....	2, 14, 19
§ 33-16-202(2)(3) (1989) .....	6
§ 33-16-203 (1989) .....	6, 20
§ 33-16-203(1) (1989) .....	5
§ 33-16-303 (1989) .....	18
§§ 70-73, 76-78 (1989) .....	15

## Wis. Stat. Ch.

50 (1989-90) .....	15
144 (1989-90) .....	15
196 (1989-90) .....	15
440 (1989-90) .....	15
625 (1960) .....	18

## Wis. Stat. §

133.01 (1989-90) .....	19
133.18 (1989-90) .....	24
601.41(5) (1989-90) .....	7, 26
601.43 (1989-90) .....	26
625.01 (1989-90) .....	6

625.11 (1989-90) .....	20
625.11(1) (1989-90) .....	2, 14
625.11(2)(a) (1989-90) .....	19
625.12 (1989-90) .....	20
625.15 (1989-90) .....	5, 6, 20
625.15(1) (1989-90) .....	5
625.21 (1989-90) .....	26
625.22 (1989-90) .....	24
625.33 (1989-90) .....	18

## Wis. Stat. Ann.

ch. 625 (1969) .....	19
§ 625.01 (West 1980) (Committee Comment 1969) .....	7
§ 625.15 (West 1980) (Committee Comment 1969) .....	18

## Utah Code Ann.

§ 76-10-926 (1991) .....	3
--------------------------	---

---

In The  
Supreme Court of the United States  
October Term, 1990

---

FEDERAL TRADE COMMISSION,

*Petitioner,*

v.

TICOR TITLE INSURANCE CO., et al.,

*Respondents.*

---

BRIEF OF AMICUS CURIAE IN SUPPORT OF  
PETITIONER

---

The States of Wisconsin, Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Idaho, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming (hereinafter "Amici States") submit this brief in support of the Federal Trade Commission's position that the judgment of the United States Court of Appeals for the Third Circuit in *Ticor Title Insur. Co. v. F.T.C.* (hereinafter *Ticor*), 922 F.2d 1122 (3d Cir. 1991), *reh'g denied*, 922 F.2d 1141 (3d Cir. 1991), should be reversed. Reversal is warranted because the court of appeals departs from this Court's precedents and adopts a standard that undermines state antitrust enforcement as well as state regulation.

## INTEREST OF THE AMICI STATES

Respondent insurers concede that they fixed prices. They admit that these price-fixing agreements were unfair and anticompetitive within the meaning of section 5 of the FTC Act. *Ticor*, 922 F.2d at 1124. Immunizing such price-fixing agreements strikes at the heart of state antitrust enforcement. Upholding immunity in this case would limit the ability of states to choose regulatory policies that rely on competitive markets, rather than pervasive regulation, to determine prices.

The Amici States have an important interest in preserving their authority in our federal system to regulate in accordance with the needs of their citizens. Whether this regulation has completely or only partially displaced competitive markets, this Court has traditionally respected the sovereignty of the states to choose regulatory policy. The lower court's decision, however, jeopardizes the states' ability to implement regulatory approaches that rely on competitive markets to meet state goals. The ruling appealed from permits private, financially interested parties to escape antitrust liability even though their anticompetitive conduct has never been reviewed by any state regulator.

The state regulatory regimes at issue here explicitly direct that the insurance commissioners of Montana and Wisconsin rely on the competitive marketplace to determine prices rather than regulate rates directly.<sup>1</sup> Unwarranted expansion of the state action doctrine in such cases leaves the attorneys general and aggrieved consumers powerless to remedy anticompetitive conduct

<sup>1</sup> See, e.g., Wis. Stat. § 625.11(1) (1989-90); Mont. Code Ann. § 33-16-201(1)(b) (1991).

under federal antitrust law or state insurance law. The attorneys general have a vital interest in maintaining the integrity of the process by which insurance transactions are accomplished. The novel exemption fashioned by the court of appeals invites price fixing by insurers in all lines of insurance despite clear state statutory language mandating reliance on competition in such markets.

Finally, as the chief law officers of their states, the attorneys general are charged with the duty of enforcing the antitrust laws. They are the primary public enforcers of state antitrust laws, which are often interpreted in conformity with federal law.<sup>2</sup>

The attorneys general also represent their states and, in most cases, their political subdivisions in federal antitrust actions for damages and injunctive relief. In their capacity as *parens patriae*, they are authorized to bring federal antitrust actions on behalf of the citizens of their states.<sup>3</sup> As the principal public enforcers of the state antitrust laws and as representatives of the primary victims of the anticompetitive conduct encouraged by the lower court's opinion, the state attorneys general have a substantial interest in ensuring that federal courts apply the antitrust laws in a manner consistent with underlying

<sup>2</sup> E.g., *Carl N. Swenson Co. v. E.C. Braun Co.*, 272 Cal. App.2d 366, 77 Cal. Rep. 378, 379-80 (1969); *State v. N.J. Trade Waste Ass'n*, 96 N.J. 8, 19, 472 A.2d 1050, 1055 (1984); *State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W.2d 1 (1966). See also Mont. Code Ann. § 30-14-104 (1989); Utah Code Ann. § 76-10-926 (1991).

<sup>3</sup> 15 U.S.C. § 15(c) (1989); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945) (common law *parens patriae*); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972).

congressional policy, this Court's past decisions, and sound public policy.

The attorneys general are frequently forced to evaluate the need for antitrust enforcement in industries that may be subject to some degree of state oversight. Expanding antitrust immunity as the Third Circuit has done would seriously impair antitrust enforcement in general.

The Amici States support the Federal Trade Commission's position that the state action doctrine does not immunize the price-fixing agreements at issue here.

#### STATEMENT OF THE CASE

The Amici States adopt and subscribe to the statement of the case presented by the Solicitor General and the Federal Trade Commission in their opening brief to this Court as to the four states which are the subject of this

appeal.<sup>4</sup> As a supplement to that statement, the Amici States provide the following background information.

Wisconsin and Montana require insurers to give "notice" to the insurance commissioner of the rates they charge. Mont. Code Ann. § 33-16-203(1) (1991); Wis. Stat. § 625.15 (1989-90). An insurer may discharge this obligation by developing its own cost data or by relying upon a filing by a licensed rate service organization ("rating bureau"), with "such modification for its own expense and loss experience as the credibility of that experience allows." Mont. Code Ann. § 33-16-203(1) (1991); Wis. Stat. § 625.15(1) (1989-90). Rating bureaus are permitted to exist to make more efficient the collection and pooling of claims and expense data against which individual insurers can price their product on a competitive

---

<sup>4</sup> The Federal Trade Commission rejected, on the basis of extensive findings of fact, the state action defense of the title insurers as to six states, Wisconsin, Montana, Arizona, Connecticut, New Jersey and Pennsylvania. *Ticor*, 922 F.2d at 1126. The court of appeals reversed and vacated the decision of the Federal Trade Commission. As to Pennsylvania and New Jersey, the FTC has not appealed the lower court's conclusion that there is no failure of the first prong of the state action test; also, as to those two states, the FTC stipulated that active supervision was present. However, while the FTC chose to seek review by this Court of the decision of the court of appeals with respect to Wisconsin and Montana, the implications of the court of appeals' erroneous decision range far beyond Wisconsin and Montana and, indeed, far beyond the insurance industry. In addition, the FTC has sought more limited review of the court of appeals' decision with respect to Arizona and Connecticut. Although not addressed in this brief for the sake of brevity, the Amici States also support the FTC's position with respect to Arizona and Connecticut.

basis. Mont. Code Ann. § 33-16-202(2)(3) (1991); Wis. Stat. § 625.01 (1989-90).<sup>5</sup>

Insurers are expected to decide, unilaterally, what rates they will charge based upon "average expense factors determined by the rate service organization or with such modification for its own expense and loss experience as the credibility of that experience allows." *E.g.*, Wis. Stat. § 625.15 (1989-90); Mont. Code Ann. § 33-16-203 (1991).<sup>6</sup> The relevant statutes recognize that the ability of each title insurer to compete on price will depend on its ability to control not only the "riskiness" of its customer base, but also its administrative expenses and its costs of searching and examining the titles it chooses to insure.<sup>7</sup>

---

<sup>5</sup> Pooling data regarding the number and type of claims enables insurers, regulators and consumers to predict the frequency and amount of claims ("the risk premium") expected under an insurance policy.

<sup>6</sup> The clear articulation prong of the *Cal. Retail Liquor Dealers Ass'n v. Midcal Alum.*, 445 U.S. 97 (1980), analysis is not at issue in this case with respect to the pooling and filing of rating information permitted by the state statutes. However, state regulatory policies were not designed to displace all competition in markets for such non-insurance services such as searches and examinations of titles. Instead, Wisconsin and Montana articulated policies *relying* on competition to determine title insurance rates. In any event, it is clear that no regulator in Wisconsin or Montana ever reviewed the filed information to determine if it comported with state policy and no regulator ever reviewed the price fixing of the respondents.

<sup>7</sup> The FTC rejected respondents' arguments that title search and examination services are part of the "business of insurance," and therefore exempt from FTC review under section 2(b) of the (continued...)

The Montana and Wisconsin statutes "presume" that the markets in which insurers make these business decisions are competitive.<sup>8</sup> Consequently, Montana and Wisconsin allow unreviewed, collectively-formulated rates to be used prior to filing. *Ticor*, 922 F.2d at 1139-40. In addition, the insurance regulators in Montana and Wisconsin are not required to hold a hearing or to examine the filings. See, *e.g.*, Wis. Stat. §§ 601.41(5) and 601.43(1) (1989-90); *Gerber v. Comm'r of Ins. of State*, 242 Mont. 369, 786 P.2d 1199 (1990).

In the present case, the regulators in Montana and Wisconsin did no more than (1) receive submissions for filing; (2) check some of them for mathematical accuracy;

---

<sup>7</sup>(...continued)

McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1989), *Ticor Title Insur. Co.*, 5 Trade Reg. Rep. (CCH) ¶ 22,744 at 22,452-22,459 (F.T.C. 1989), and that respondents' price fixing was protected under the *Noerr-Pennington* doctrine. *Id.* at 22,469-60. These issues are not before this Court.

<sup>8</sup> "On the whole, the insurance market is fairly competitive, and attention directed to making it more so will be more rewarding than effort directed to the regulation of particular rates." Wis. Stat. Ann. § 625.01 (West 1980) (Committee Comment 1969). "It is the express intent of this chapter to permit and encourage competition between insurers on a sound financial basis, and nothing in this chapter is intended to give the commissioner power to fix and determine a rate level by classification or otherwise." Mont. Code Ann. § 33-16-101 (1991). Consistent with this "express intent," the insurance departments of these two states are limited to a reactive posture because their state statutes presume that insurance markets are operating competitively, Wis. Stat. § 625.11(2)(a), (1989-90), or that rates cannot be found excessive if competition is present, Mont. Code Ann. § 33-16-201(1)(b) (1991).

and (3) make certain inquiries regarding geographic scope and supporting data. Many inquiries went unanswered at all, or unanswered for several years. *Ticor*, 922 F.2d at 1139-40 n.16.

### SUMMARY OF ARGUMENT

The attorneys general ask the Court to reverse the decision of the court of appeals for the following reasons:

1. For anticompetitive conduct to be immune under the State action doctrine, it must be undertaken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation. It also must be "actively supervised by the state." *Cal. Retail Liquor Dealers Ass'n v. Midcal Alum.*, 445 U.S. 97, 105 (1980). Active supervision means that the States "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick v. Burget*, 486 U.S. 94 (1988) (emphasis added). The court of appeals, however, adopted a rule that "some basic level of [regulatory] activity" would be sufficient to meet the active supervision prong of the state action defense. *Ticor*, 922 F.2d at 1136.

The court of appeals' decision should be reversed not simply because it conflicts with long-standing precedent of this Court, but because it undercuts the ability of the states to use their regulatory agencies to implement narrowly tailored, rather than pervasive, regulatory schemes. The same state statutes which authorize joint filing, expressly presume and provide that competition will determine title insurance rates and search and examination fees. These narrowly-tailored state policies were adopted against a backdrop of a national policy

favoring competition. If not reversed, the lower court's standard will jeopardize the cooperative federalism embodied by this Court in the state action doctrine.

2. The insurance departments of Montana and Wisconsin did not review filings of the title insurers because they operated under the presumption that the insurance markets in question were operating competitively. The filings of rating bureaus are required to provide notice to regulators of rates that may be charged. Such filings, however, did not and do not eliminate the statutory obligation of individual insurers to establish competitive rates based on their own experience and costs. Agreements among insurers to charge specific prices are explicitly prohibited by state law. Far from being reviewed by state regulators, the agreements by title insurers to fix the fees they charge for searches and examinations, and to file rates jointly based in part on those fixed fees, subverted state regulatory schemes by making market-driven rate review impossible.

In acquiescing to the rates filed, the states did not authorize the price fixing which preceded the filing. See *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 554 n.26 (1978). State acquiescence in one activity (i.e., the filing of pooled rating information) is not state approval of a related but distinct activity (i.e., classic horizontal price fixing).

3. The court of appeals' decision to grant state action immunity appears to be based, in part, upon the court's misperception that the extraordinary writ of mandamus is available to consumers and that its availability obviates the need for active state supervision. *Ticor*, 922 F.2d at 1139-40. The extent to which the lower court's misperception constituted an independent basis for its

decision is unclear. It is clear, however, that mandamus cannot substitute for active state supervision. Putting the burden on *consumers* rather than on state officials to initiate review of the anticompetitive conduct directly contravenes the standard and rationale for state action immunity. In any event, in Wisconsin and Montana, mandamus cannot remedy the price-fixing conduct or compel state officials to exercise their discretion in any way that would affect the rates.

## ARGUMENT

### I. THE CIRCUIT COURT'S STANDARD UPSETS THE CAREFULLY-DRAWN BALANCE BETWEEN THE STATES' RIGHT TO CHOOSE REGULATORY SCHEMES AND THE NATIONAL POLICY FAVORING COMPETITION.

This Court has embodied basic principles of federalism and state sovereignty in the state action doctrine. *E.g.*, *Parker v. Brown*, 317 U.S. 341 (1943); *Cal. Retail Liquor Dealers Ass'n v. Midcal Alum.*, 445 U.S. 97 (1980) (hereinafter *Midcal*). The court of appeals' deviation from well-established decisions of this Court jeopardizes the cooperative federalism between federal antitrust law and state regulation this Court has carefully constructed and limits state regulatory choices.

### A. The test applied by the lower court conflicts with long-standing precedent of this Court.

This Court has repeatedly stated that before private parties regulated by the states may enjoy immunity from federal antitrust liability, such parties must satisfy a two-pronged test: First, the conduct must be undertaken pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation. Second, the anticompetitive conduct must be "actively supervised by the state." *Midcal*, 445 U.S. at 105. Active supervision means that the states "*have and exercise* power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick v. Burget*, 486 U.S. 94, 101 (1988) (emphasis added).

Applying this Court's "active supervision" test here is a relatively easy task: No regulator in Wisconsin or Montana specifically reviewed the anticompetitive conduct at issue and, hence, there can be no state action immunity.<sup>9</sup> The court of appeals, however, ignored this controlling precedent and substituted the following standard:

Where . . . the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to

<sup>9</sup> In Wisconsin and Montana there was no review, whatsoever, of the merits of the prices for search and examination services set by respondents. Hence, this Court need not examine the quality or "meaningfulness" of state regulatory decisions (Respondents' Brief in Opposition to Petition for Certiorari at 5, 6-7).

declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established.

*Ticor*, 922 F.2d at 1136 (quoting *New England Motor Rate Bureau, Inc. v. F.T.C.*, 908 F.2d 1064, 1071 (1st Cir. 1990) (hereinafter *NEMRB*)).

The court of appeals, thus, adopted what amounts to little more than a "bodies, buildings and budget" standard by which state action is to be measured. The mere presence of a state regulator involved in some basic level of activity could immunize private price fixing. The crude approach to the active supervision prong adopted by the lower court abrogates the fundamental principles of state sovereignty. Specifically, it undercuts the ability of states to use their regulatory agencies to implement partial, rather than pervasive, regulatory policies.

**B. The lower court's standard undermines the system of cooperative federalism embodied in the state action doctrine.**

The state action doctrine rests "on principles of federalism and state sovereignty." *City of Columbia v. Omni Outdoor Advertising*, \_\_\_ U.S. \_\_\_, 113 L.Ed.2d, 382, 391 (1991). See also *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 343 (1987). Under such principles, this Court protected the right of a state to adopt a comprehensive regulatory scheme, even though that scheme had a profound, adverse effect on competition, where state officials, not private parties, determined the nature of the

restraint. *Parker v. Brown*, 317 U.S. 341 (1943).<sup>10</sup> Consistent with these same principles, the Amici States ask no more than that this Court protect the states' right to adopt less-than-comprehensive regulatory schemes that use competition as the key component of regulatory policy.

Permitting private parties to immunize their price fixing through use of state statutes *promoting* rather than displacing the federal policy favoring competition would contravene the state action doctrine and our system of "cooperative federalism." Just as states can adopt exquisitely comprehensive regulatory schemes displacing every vestige of competition, states should be able to regulate loosely or just monitor markets, relying on competition to govern market conduct.<sup>11</sup>

Here, Wisconsin and Montana attempted to fine-tune their insurance regulatory schemes to permit efficiency-enhancing joint activity--the pooling of experience data

---

<sup>10</sup> In *Parker*, California's regulatory scheme directly contravened the national policy favoring competition. State policy sought to enhance prices received by in-state producers who shipped 95 percent of their raisin output in interstate commerce. 317 U.S. at 359. The plaintiff in *Parker* claimed that he had been irreparably injured by the state's displacement of competition. *Id.* at 349.

<sup>11</sup> In *Midcal* and *324 Liquor*, this Court denied state action immunity to private parties. There the states authorized price fixing by private parties and enforced participation in the scheme but did not supervise the actual setting of prices. Here, Wisconsin and Montana explicitly ban agreements to adhere to prices, only allow minimal joint filings from which individual insurers are free to deviate and have not reviewed the filings regarding search and examination fees to determine if they are in compliance with state policies.

and the joint filing of rating information.<sup>12</sup> At the same time, these states mandated that insurers make independent decisions regarding the prices they would charge. The same statutes required insurance regulators to presume that insurance markets operated competitively.<sup>13</sup> Thus, the regulatory schemes in place in Wisconsin and Montana (a) provide for competition to determine the actual level of rates and, consequently, (b) do not provide for active oversight of the competitive price-setting process. Largely because of this conscious state policy to use competitive markets to determine rates, Wisconsin and Montana regulators adopted a "hands-off" policy toward title insurance, especially as it related to non-insurance components such as search and examination services.<sup>14</sup>

---

<sup>12</sup> Section II, below, details the passive regulatory policies in Montana and Wisconsin.

<sup>13</sup> Wis. Stat. § 625.11(1) (1989-90); Mont. Code Ann. § 33-16-201(1)(b) (1991). This presumption would apply with added force regarding prices for items which are not part of the business of insurance, such as search and examination services.

<sup>14</sup> The rates for these services were not reviewed at all. Wisconsin regulators stated that they had never examined the title insurance rating bureau, never had a hearing on any insurance rate filing in any line of insurance, never issued a rate suspension order, did not have the resources to review rates and, in general, "followed a hands-off policy in dealing with title insurers." *Ticor Title Insur. Co.*, 5 Trade Reg. Rep. (CCH) ¶ 22,744, at 22,446 (FTC 1989) (quoting testimony of Wisconsin regulators).

In addition, a key Wisconsin official testified that the department did not have any idea what an efficient company's

(continued...)

Respondents exhibited blatant disrespect for state policy when they concealed their private price-fixing scheme behind minimal "notice" filings. Thus, the court of appeals immunized price fixing that directly conflicted with the states' explicit reliance on competition.

The court of appeals' test would thwart attempts by state legislators to rely on the federal policy favoring competition when they fashion narrowly tailored regulatory schemes. Instead of promoting federalism, the state action doctrine as enunciated by the lower court would prevent states from exercising their sovereignty.

### C. The lower court's standard limits state regulatory choices.

The court of appeals' approach would *limit* rather than expand the states' regulatory choices. Private parties in many industries subjected to "some basic level of [regulatory] activity" could hereafter claim that they are entitled to the defense of state action immunity from federal antitrust liability. Almost every industry is subject to state oversight on some level, by at least one state agency. The range of state oversight extends from the licensing of entrants into professional services markets, *see generally*, Mont. Code Ann. Title 37, *et seq.* (1991); Wis. Stat. ch. 440, *et seq.* (1989-90), to the regulation of every aspect of the ratemaking activities of public utilities; Mont. Code Ann. Title 69 (1991); Wis. Stat. ch. 196 (1989-90), with a myriad of regulatory gradations in between.

---

<sup>14</sup>(...continued)  
expenses would be for search and examination services even though such information was necessary to regulate such charges.  
*Id.*

Frequently, the states regulate certain aspects of an industry's operation while allowing unmonitored marketplace competition to determine many, if not most, economic decisions.

The "buildings, bodies and budget" test promulgated by the lower court impairs the states' ability to devise regulatory policies that use the market as a means to enhance efficiency and consumer welfare. Several states which have adopted innovative approaches to insurance regulation that rely explicitly on a judicious mix of competition and regulation.<sup>15</sup>

A fundamental concept of modern economics is that the appropriate role of government is to establish the laws that make it possible for markets to operate competitively.<sup>16</sup> Wisconsin and Montana attempted to implement this idea with their rating-bureau statutes. The Amici States request this Court to respect their policy in its application of the state action doctrine.

---

<sup>15</sup> For example, New Jersey recently passed the Fair Automobile Insurance Reform Act of 1990 (the FAIR Act) which both repealed the state antitrust exemption for the automobile insurance industry and adopted provisions that prohibit insurers from using rating organizations for any purpose other than with respect to historical loss data. 1990 N. J. Sess. Law Serv. Ch. 8, §§ 70, 69 (West).

<sup>16</sup> See generally R. Coase, "The Problem of Social Cost," 3 J.L. & Econ. 1 (1960).

## II. THE CIRCUIT COURT'S DECISION MISAPPREHENDS THE INSURANCE REGULATORY SCHEMES OF MONTANA AND WISCONSIN.

Having *understated* the level of state involvement needed to invoke state action immunity, the lower court proceeded to *overstate* the degree of regulatory oversight actually used in Wisconsin and Montana. The joint filings by title insurance rating bureaus are primarily informational and do not supplant the obligation of individual companies to set rates competitively. The court of appeals erred in stating: "Once the title insurance rating bureau establishes *the uniform rate* for search and examinations services in a certain state, the insurance companies that are members of the bureau charge this rate for these services." *Ticor*, 922 F.2d at 1129 (emphasis added). The Montana and Wisconsin statutes explicitly prohibit agreements among insurers to charge any particular rate or fee. Indeed, in Wisconsin, a proposal in the late 1970's to cap search and examination fees failed because the insurers were "inalterably opposed" to active rate regulation.<sup>17</sup>

---

<sup>17</sup> In April, 1975, the Wisconsin Department of Insurance held a hearing on a proposed title insurance rule (Donohoe 1634-37; RX 320C-E). This proposed rule would have required, among other things, specific data to be submitted as justification for title insurance rates, and would have set a maximum on the amount that title insurers could charge for conducting a title search and examination (Donohoe 1634-37; RX 320C-E). The insurers belonging to the Wisconsin Rating Bureau were "inalterably opposed" to the two requirements of the proposed rule (Donohoe 1639; RX 326-326A). The rule was not promulgated by the Wisconsin Department (Donohoe 1640, 1653).

**A. Montana and Wisconsin do not review title search and examination fees.**

The statutes in Montana and Wisconsin rely upon competition to set title insurance rates and, consistent with that reliance, do not provide for active review of the filed "notices" of rates. Far from condoning price fixing, the insurance statutes of Wisconsin and Montana *explicitly prohibit* agreements among insurers to use or adhere to the published rates. *E.g.*, Wis. Stat. § 625.33 (1989-90); Mont. Code Ann. § 33-16-303 (1991).<sup>18</sup>

Montana's and Wisconsin's reliance on competition, rather than regulation, to set rates and related expenses is underscored by the Committee Comment to the 1969 revisions to the Wisconsin insurance statutes, which states: "Of course, a competitively oriented rating law such as this one will not provide for active regulatory intervention to ensure what this section directs, but it sets the standard and relies mainly on competition to achieve the goal." Wis. Stat. Ann. § 625.15 (West 1980) (Committee Comment 1969). *See also* Mont. Code Ann. § 33-16-101(2) (1991).<sup>19</sup>

<sup>18</sup> The 1969 Committee Comment dealt with this issue explaining: "*Rates may be made individually or collectively by bureaus, but agreements to adhere to bureau rates are prohibited.*" Wis. Stat. Ann. ch. 625 (West 1980) (Committee Comment at 5) (emphasis added).

<sup>19</sup> Indeed, the underlying premise of the 1969 revisions in Wisconsin's rating bureau statute underscores the emphasis the state placed on insurer competition to set rates, not direct regulation: "The existing [much more rigid and comprehensive] system of rate regulation has been rendered unnecessary through the development of a strikingly greater degree of  
(continued...)

The powers of the insurance departments of both Wisconsin and Montana are limited because their state statutes presume that insurance markets are operating competitively, Wis. Stat. § 625.11(2)(a) (1989-90), or that rates cannot be found excessive if competition is present. Mont. Code Ann. § 33-16-201(1)(b) (1991). Wholly apart from these specific provisions, state regulatory agencies must operate in a manner which maximizes competition.<sup>20</sup>

The Wisconsin Legislature's move to the new system in 1969 was premised on the assumption that insurance markets operate competitively. Consistent with this premise, the statutes provide that: "Insurers can use the rates they choose. No approval is required, and a filing is required only for information and after the fact." *Id.* The Wisconsin Legislature recognized that laws and market forces other than those put into place by the new rating

<sup>19</sup>(...continued)

meaningful price competition in many of the most important lines of insurance." Wis. Stat. Ann. ch. 625 (West 1980) (Committee Comment 1969). The Wisconsin legislators concluded that this change in industry attitudes and practices together with enumerated defects in "[r]ate regulation in the traditional manner," "call for a system of rate control which eliminates the requirement that rates be reviewed by the commissioner before use." *Id.*

<sup>20</sup> For example, Wis. Stat. § 133.01 (1989-90), provides:

It is the intent of the legislature to make competition the fundamental economic policy of this state and, to that end, state regulatory agencies shall regard the public interest as requiring the preservation and promotion of the maximum level of competition in any regulated industry consistent with the other public interest goals established by the legislature.

system would operate to prevent collusion in rate-setting by individual insurers.

Given the laissez faire structure of insurance rate regulation described above, it is understandable why Wisconsin and Montana regulators never reviewed title insurance rates and certainly did not review the fixing of search and examination fees. The regulators relied on competition to determine rates because their state insurance statutes mandate that competition, not the regulators, shall determine actual market rates.

**B. The price fixing would have made rate review impossible.**

The figures reported for search and examination fees on the rate filings reflected *price-fixed* search and examination fees, not a compilation or average of fees each company expected to incur. Because price fixing distorted the market price for the search and examination services, state regulators could not have reviewed the reasonableness of these rates on a state-specific basis had they chosen to do so.

The statements that insurers in Wisconsin and Montana are required to file with their respective insurance commissioners, see Wis. Stat. § 625.15 (1989-90); Mont. Code Ann. § 33-16-203 (1991), must include information regarding risks, expenses and profits. See Wis. Stat. § 625.12 (1989-90); Mont. Code Ann. § 33-16-201 (1991). State law presumes that insurers incur costs and expenses in a competitive marketplace. See, e.g., Wis. Stat. § 625.11 (1989-90); Mont. Code Ann. § 33-16-201 (1991).

Any attempt to determine whether or not rates or fees are excessive must include a comparison of the filed rates with rates and fees charged by insurers in the competitive market. If search and examination fees have been artificially inflated, excessive rates can be made to appear acceptable. Distorting the market for search and examination services thereby impairs any attempt to review the performance of insurers. Indeed, the passive regulatory structure and performance in Wisconsin and Montana, as outlined by both the court of appeals and the FTC, *Ticor Title Insur. Co.*, 5 Trade Reg. Rep. (CCH) ¶ 22,744 at 22,446, 22,450-51 (F.T.C. 1989), is common and reflects the reliance of the states generally on competitive markets for determining the level of title insurance rates.

As in *St. Paul v. Barry*, 438 U.S. 531, 554 n.26 (1978),<sup>21</sup> Wisconsin and Montana did not, by acquiescing in the informational or "notice" filings, authorize the fixing of search and examination fees. *Id.* at 554 n.26. State acquiescence in one activity (i.e., the filing of pooled rating information) is not state review, much less approval, of a separate and distinct activity of classic horizontal price fixing regarding the underlying expenses in that filing. See generally, *In re Insurance Antitrust Litig.*, 938 F.2d 919 (9th Cir.), *reh'g denied*, \_\_\_ F.2d \_\_\_ (9th Cir. 1991); *Bolt v. Halifax Hosp. Medical Center*, 891 F.2d 810 (11th

---

<sup>21</sup> In *St. Paul*, the Court assumed that policy form changes desired by insurers had been filed with the state insurance director. However, even though Rhode Island acquiesced to the filing of these policy forms, there was no indication that Rhode Island had "authorized the concerted refusal to deal on any terms with St. Paul's policyholders." *Id.* Hence, even though the state had received and approved the policy forms at issue in *St. Paul*, state action immunity was not available to the defendant insurers there.

Cir. 1990); *Medic Air Corp. v. Air Ambulance Auth.*, 843 F.2d 1187 (9th Cir. 1988).

The respondent insurers have failed to provide any evidence that the relevant states supervised or approved the agreement to fix title search and examination fees. Further, that price-fixing conspiracy was neither a reasonable nor a necessary consequence of filing collective rate schedules. In fact, the collusion would have subverted effective rate review had it been attempted. Private parties who subvert the regulatory process ought not to enjoy immunity from otherwise unlawful acts because they have defeated the objective of the process. Accordingly, the respondent insurers' agreement to fix search and examination fees is neither state action nor entitled to be immune from federal antitrust regulation.

### III. THE EXTRAORDINARY WRIT OF MANDAMUS CANNOT SUBSTITUTE FOR EFFECTIVE STATE SUPERVISION.

The court of appeals' decision to grant state action immunity is based, in part, upon the court's perception that the extraordinary writ of mandamus is available to consumers and that its availability obviates the need for *active state* supervision. *Ticor Title Ins. Co. v. F.T.C.*, 922 F.2d 1122, 1139-40 (3d Cir. 1991), *reh'g denied*, 922 F.2d 1141 (3d Cir. 1991). The court of appeals' reliance on mandamus both contradicts the sound policy that this Court has previously articulated and misapprehends state law.

#### A. Placing the burden of enforcing state policy on consumers circumvents the policy underlying the state action doctrine.

The availability of mandamus does not constitute *active state* supervision. Active state supervision ensures that the state action doctrine shelters only the particular anticompetitive acts of private parties which actually further state regulatory policies. *E.g.*, *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46-47 (1985). In this case, the hypothetical possibility that consumers will seek and obtain judicial review, if it "exists at all, falls far short of satisfying the active supervision requirements." *Patrick v. Burget*, 486 U.S. 94, 104 (1988).

Even if mandamus were appropriate,<sup>22</sup> mandamus cannot transform passive state supervision into active supervision. Mandamus simply shifts the burden of enforcing state policy from state regulators to private litigants.<sup>23</sup> The court of appeals did not consider that a private litigant has neither the ability nor the incentive to shoulder this burden of mandamus litigation. Federal and state antitrust laws provide treble damage recovery for

<sup>22</sup> As discussed below, mandamus is inappropriate where, as here, state law requires the state official to exercise discretion and judgment.

<sup>23</sup> The Wisconsin attorney general lacks the ability to seek and obtain an extraordinary writ of mandamus compelling the insurance commissioner to review title insurance rates in any particular fashion. *See, e.g.*, *Estate of Sharp*, 63 Wis. 2d 254, 217 N.W.2d 258 (1974). Thus, the court of appeals' decision necessarily places the burden of enforcing state policy upon private litigants.

parties injured by antitrust violations, but rules regarding mandamus afford no such remedies. See 15 U.S.C. § 15 (1989); Wis. Stat. § 133.18 (1989-90); Mont. Code Ann. § 30-14-133 (1991). Treble damages provide private litigants with an incentive to supplement governmental enforcement of the antitrust laws. See *Gerol v. Arena*, 127 Wis. 2d 1, 377 N.W.2d 618 (Ct. App. 1985). Relief through mandamus provides no such incentive. See, e.g., *Law Enforcement Standards Bd. v. Village of Lyndon Station*, 101 Wis. 2d 472, 494, 305 N.W.2d 89, 100 (1981); *State ex rel. Butte Youth Serv. Center v. Murray*, 170 Mont. 171, 173-74, 551 P.2d 1017, 1019 (1976). Indeed, a successful mandamus petition provides nothing more than prospective relief.<sup>24</sup>

By placing the duty to enforce state policy in the hands of consumers while removing the incentives provided by antitrust statutes, the court of appeals seriously weakens the policies and protections underlying the "active state supervision" requirement. To jeopardize the national policy promoting competition in favor of such a gauzy cloak of state involvement runs counter to sound policy and would abrogate the state action doctrine. 324 *Liquor Corp. v. Duffy*, 479 U.S. 335, 343 (1987); *Cal. Retail Liquor Dealers Ass'n v. Midcal Alum.*, 445 U.S. at 105.

<sup>24</sup>See Mont. Code Ann. § 33-16-211 (1991) and Wis. Stat. § 625.22 (1989-90). Setting forth remedies of import to private litigants, each statute authorizes the respective insurance commissioner to prohibit the future use of violative rating schemes.

**B. Mandamus is inappropriate to compel the insurance commissioner to perform a discretionary act.**

The remedy of mandamus is drastic, to be invoked only in extraordinary situations. *Will v. United States*, 389 U.S. 90 (1967). Mandamus is unavailable to compel action when the duty to act is not clear and unequivocal and where the decision to act requires the exercise of discretion. See, e.g., *Law Enforcement Standards Bd.*, 101 Wis. 2d at 494, 305 N.W.2d at 100; *Butte Youth Serv.*, 170 Mont. at 173-74, 551 P.2d at 1019.<sup>25</sup>

In Montana, the insurance commissioner maintains the discretion to investigate insurance rates and determine whether further action is warranted. *Gerber v. Comm'r of Ins. of State*, 242 Mont. 369, 372, 786 P.2d 1199, 1201 (1990). Following an extensive review of the Montana code,<sup>26</sup> the *Gerber* court determined that the insurance

<sup>25</sup> The court of appeals itself cites *Law Enforcement Standards Bd.*, neglecting, however, to address the restrictive guidelines set forth above. *Ticor*, 922 F.2d at 1140

<sup>26</sup> E.g., Mont. Code Ann. § 33-1-311(1) (1991): "[T]he commissioner MAY conduct such examinations and investigations . . . as [she] may deem proper"; Mont. Code Ann. § 33-1-701(1) (1991): "[T]he commissioner MAY hold hearings for any purpose within the scope of this code deemed by [her] to be necessary"; Mont. Code Ann. § 33-1-317 (1991): "[T]he commissioner MAY after having conducted a hearing pursuant to § 33-1-701, impose a fine"; Mont. Code Ann. § 33-1-318 (1991): "[W]henever IT APPEARS TO THE COMMISSIONER that a person has engaged in or is about to engage in an act or practice constituting a violation of [this act, she] MAY . . . issue an order directing the person to cease and desist." Mont. Code (continued...)

commissioner's investigative and prosecutorial discretion rivaled that of a prosecutor and warranted quasi-judicial immunity from forced action via a writ of mandamus. *Id.* Accordingly, a writ of mandamus would not issue to compel his performance of discretionary acts.

Wisconsin has similarly placed certain powers within the discretion of the insurance commissioner.<sup>27</sup> Where authority is combined with specific grants of discretion similar to the Wisconsin statutory scheme, a regulator's discretion to investigate is very broad. *See, e.g., Vretenar v. Hebron*, 144 Wis. 2d 655, 424 N.W.2d 714 (1988) (municipal officers). *See also Gerber*, 242 Mont. at 372, 786 P.2d at 1201 (insurance commissioner).

Failing to recognize the discretionary nature of the insurance commissioner's power, and the impropriety of a writ of mandamus to compel these discretionary duties, the court of appeals erroneously concluded that mandamus was a proper mechanism to force "active state supervision."

---

<sup>26</sup>(...continued)

Ann. (1991) as cited in *Gerber*, 242 Mont. at 369, 786 P.2d at 1199 (all emphasis from opinion).

<sup>27</sup> *See, e.g., Wis. Stat. § 601.41(5) (1989-90):* "The commissioner MAY at any time hold . . . hearings . . . for the purposes of investigation . . . ." *Wis. Stat. § 601.43 (1989-90):* "WHENEVER THE COMMISSIONER DEEMS IT NECESSARY in order to inform himself or herself about any matter related to the enforcement of chs. 600 to 647, the commissioner MAY examine the affairs and condition of . . . any person or organization of persons doing . . . insurance business in this state . . . ." *Wis. Stat. § 625.21 (1989-90):* "IF THE COMMISSIONER FINDS that competition is not an effective regulator of rates . . . he or she MAY promulgate a rule." (Emphasis added.)

*Ticor*, 922 F.2d at 1139-40. The Third Circuit Court of Appeals' opinion is, therefore, based on a flawed premise and must be reversed.

## CONCLUSION

For the foregoing reasons the decision of the lower court should be reversed.

Respectfully submitted by,

*Counsel for the State of Wisconsin*

**JAMES E. DOYLE**

Attorney General

**Kevin J. O'Connor\***

Assistant Attorney General

in Charge of Antitrust

Enforcement

Wisconsin Department of Justice  
Post Office Box 7857  
Madison, Wisconsin 53707-7857  
(608) 266-8986

*\*Counsel of Record*